

IN THE COURT OF CLAIMS OF OHIO

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TRANSAMERICA BUILDING)	
COMPANY, INC.,)	
)	
Plaintiff,)	Case No. 2013-00349
)	
v.)	Judge McGrath
)	
OHIO SCHOOL FACILITIES)	Referee Wampler
COMMISSION,)	
)	
Defendant.)	

**DEFENDANT OHIO SCHOOL FACILITIES COMMISSION’S REPLY TO
PLAINTIFF TRANSAMERICA BUILDING COMPANY’S BRIEF IN
OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION & SUMMARY

On April 30, 2014, Defendant Ohio School Facilities Commission (“OSFC” or “Defendant”) filed a 15 page Motion for Summary Judgment in this matter, based on the failure of Plaintiff Transamerica Building Company (“TransAmerica” or “Plaintiff”) to file this case within the 2-year statute of limitations; failure to follow the contractual dispute process as set forth in Article 8 of the General Conditions of Contract in Plaintiff’s contract; and failure to demonstrate Defendant was the proximate cause for the alleged damages claimed in this case. On May 14, 2014, Plaintiff filed its 42 page Memorandum in Opposition to the Motion (“Brief in Opp.”). Pursuant to the Court’s Order of May 20, 2014, Defendant hereby presents this Reply.

In its Brief in Opposition, Plaintiff argues that the 2-year statute of limitations set forth in R.C. 2743.16 is extended 120 days by R.C. 153.16, even though no mention of the statute of limitations is made in R.C. 153.16. With respect to its failure to follow the

administrative claim process set forth in Article 8 of the General Conditions of Contract (“GC”), Plaintiff argues the following: that its original notice of claim under GC Article 8 was not really a notice of claim, even though it was styled as a “notice” under GC “8.1.1”; that Defendant waived Plaintiff’s non-compliance with GC Article 8; that the alleged defective plans made it impossible for Plaintiff to follow the GC Article 8 process; and that because mobilization on the site had not yet occurred when it gave its notice of claim under GC Article 8, it could not ascertain the exactness of its damages, so it was not really a notice of claim; and finally, Plaintiff appears to argue that its expert witness’s “Measured Mile” methodology of examining the claim, by itself, is proximate cause, even though the methodology used does not link any amounts claimed to any breach.

STATUTE OF LIMITATIONS

R.C. 2743.16(A) simply provides that all civil actions against the State “shall be commenced no later than two years after the date of accrual of the cause of action...”

Plaintiff argues that the 2-year period is enlarged through R.C. 153.16(B). It provides:

(B) Notwithstanding any contract provision to the contrary, any claim submitted under a public works contract that the state or any institution supported in whole or in part by the state enters into for any project subject to sections 153.01 to 153.11 of the Revised Code shall be resolved within one hundred twenty days. After the end of this one hundred twenty-day period, the contractor shall be deemed to have exhausted all administrative remedies for purposes of division (B) of section 153.12 of the Revised Code.

First, there is nothing in R.C. 153.16(B) that addresses expanding the limitation period.

Legislative intent is to be determined primarily from the statutory language. *Stewart v. Board of Elections*, 34 Ohio St. 2d 129, 296 N.E. 2d 676 (1973). In determining the intent of the Legislature, words must not be inserted or deleted from the statute. *State ex*

rel. Celebrezze v. Board of Commissioners, 32 Ohio St. 3d 24, 512 N.E. 2d 332 (1986); *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St. 2d 24, 263 N.E. 2d 249 (1970). R.C. 153.16(B) specifically addresses the concept of exhaustion of administrative remedies prior to filing a suit. It does not address the extension of the 2-year statute of limitations. The 120 days for the administrative remedy to be exhausted neither equates to, or affects, the running of the statute of limitations.

Plaintiff cites to *Painting Co. v. Ohio State Univ.*, 10th Dist. No. 09AP-78, 2009-Ohio-5710, for the proposition that a claim has not accrued until the end of the 120 day period. That case however, in its analysis of the statute of limitations stated that “[a]ny claim submitted under a public works contract with the state necessarily will accrue, **at the latest**, by the end of the 120-day statutory period...” *Id.* at ¶ 14, emphasis added. By referring to “at the latest” the Court was going through all possibilities of considering when the 2-year period *could* have expired.

Plaintiff also cites to *R.E. Schweitzer Constr. Co. v. Univ. of Cincinnati*, 10th Dist. No. 10AP-954, 2011-Ohio-3703 for the same proposition. The Schweitzer Court is more on point with Plaintiff’s interpretation; however that case is distinguishable in that there was no dispute as to whether the work was performed or whether it was requested to be performed. The dispute was about the quantity and price of the work. In any event, only the General Assembly can enact statutes to extend the statute of limitations period for R.C. 2743.16, not a court.

FAILURE TO FOLLOW GC ARTICLE 8

On February 17, 2011, Plaintiff submitted a letter with the subject matter styled “Notice-Revised Drawings.” Motion at Exhibit 1. In that letter Plaintiff indicated that “per section 8.1.1 of the contract we are required to notify you, and the Architect (through you); that our ability to execute the project per the contract schedule in being hindered.” *Id.* Plaintiff stated that the lack of revised/corrected/updated drawings has:

“impeded our ability to produce accurate shop drawings, complicated the submittal process, and resulted in many of our RFI answers being tied to the new drawings. Additionally, we are concerned that materials anticipated to be ordered and delivered per the Construction Schedule will be late and may subject us to costs due to material escalation. Ultimately, the lack of drawings will prevent us from performing as required. *Id.*”

There is no doubt that Plaintiff, at that point in time, had invoked GC Article 8, and had noticed a claim. However, Plaintiff did not submit any substantiation with respect to that claim regarding impacts from incomplete plans until March 8, 2012, over a year later. Plaintiff now claims that: 1) Defendant OSFC waived enforcement of the GC Article 8 process; 2) because Plaintiff had not yet mobilized on site, the notice under GC Article 8 was not really a notice; 3) the alleged failure to provide adequate plans by Defendant waived GC Article 8; and 4) OSFC agreed to extend the time for Plaintiff to comply with GC Article 8.

None of the above arguments is valid. First, contrary to Plaintiff’s assertion, the initial Notice of February 17, 2011, was in fact not timely. If the design plans were flawed and incomplete on February 11, 2011, and deserving of a GC Article 8 Notice of Claim, then those same plans were flawed and incomplete on bid day, and the Notice of Claim should have come 10 days subsequent to contract award. Plaintiff’s own brief

supports this notion. “The following facts also support that the drawings were far from “full and accurate” at bid time . . .”, Brief in Opp. at 3.

Plaintiff first argues that the Parties, through a March 1, 2011, letter, mutually agreed to extend the time for Plaintiff to comply with GC Article 8 pending the issuance of a revised set of drawings, which they assert never came. There was no time frame set or agreement by Plaintiff with that arrangement. Yet, even if there were an agreement to extend the 30 day period for Plaintiff to substantiate its claim, Plaintiff did not file its Claim Documentation until March of 2012, a year later. And even then it was not substantiated. It is specious for Plaintiff to argue that a time extension, or waiver, of over a year was granted on this issue, without documenting an agreement to do so.

The issues Plaintiff raises alleging waiver do not meet the standard stated in *Ashley v. Henahan*, 56 Ohio St. 559 (1897). The Court in *Ashley* held that “[s]uch stipulation being for the benefit of the employer, proof of a waiver must either be in writing, or by such clear and convincing evidence as to leave no reasonable doubt about it,” ¶ 5 of the syllabus, “Equivocal conduct, or conduct of doubtful import, is not sufficient.” *Id* at 574, quoting *O’Keefe v. St. Francis’s Church*, 59 Conn. 551, 661, 22 A. 325, 327 (1890).

In its Brief in Opposition, Plaintiff points to numerous situations where Plaintiff was allegedly giving notice of impacts on the Project. Brief in Opp. at 16. These admissions, in and of themselves, clearly demonstrate Plaintiff’s failure to not only give timely notice of claims, but to also follow the GC Article 8 process. Plaintiff alleges that it provided notice on April 15, 2011, that the revised drawings “have not been produced to minimize future coordination issues.” *Id*. On May 16, 2011, Plaintiff asserts it gave

notice of lost time and impacts to the schedule. *Id.* Therefore, under GC 8.1.1, Plaintiff then had 10 days to give notice of a claim for these impacts. Yet, Plaintiff sent no notice of any other claim until March of 2012, almost 10 months later.

Nor did OSFC waive compliance with GC Article 8 by allegedly failing to provide complete and accurate plans. Under this argument, any and every alleged breach of contract -- no matter how small, no matter its relation to and impact on the Project as a whole -- would excuse a contractor on any State contract from following the contractual claim procedure. It is a circular argument, designed to cover Plaintiff's own failure to perform. Under this argument, contractors would always be excused from complying with the contractual claim process by simply asserting the public owner committed some breach which may or may not be the source of the claim to begin with.

Nor can Plaintiff argue that the February 17, 2011, letter was not a notice of a claim because the Plaintiff had not mobilized on the Project. It is wholly irrelevant whether Plaintiff had mobilized or not. First, a lot of work occurs on a project even before a spade of dirt is turned. Whether it is buying out subcontracts, ordering materials, submitting shop drawings, or coordinating schedules, mobilization to the job site was irrelevant to Plaintiff's failure to follow GC Article 8. It is hoped that Plaintiff examined the plans prior to bidding. If the plans were indeed as inadequate as claimed, Plaintiff knew of this on bid day and should have submitted its claim much earlier than it actually did.

Additionally, in its argument on R.C. 4113.62, Plaintiff misconstrues the plain language of the statute with Plaintiff's own failure to follow GC Article 8. R.C. 4113.62 refers to a contractual provision that precludes a contractor from **making** a claim for

delay if the delay is caused by the owner, i.e. a “no damages for delay” clause. Here, there is no such clause preventing recovery. The contract does not bar recovery, which is the standard in R.C. 4113.62. It merely provides for a process to be followed for a contractor to make a claim, with the failure to follow that process then a waiver of the claim.

PROXIMATE CAUSE

This Court has previously ruled:

“[W]here no facts are alleged justifying any reasonable interference that the acts or failure of the defendant constitute the proximate cause of the injury, there is nothing for the [trier of fact] (to decide), and, as a matter of law, judgment must be given for the defendant.” *Sullivan v. Heritage Lounge*, 10th Dist. No. 04AP-1261, 2005-Ohio-4675, ¶33, quoting *Stuller v. Price*, 10th Dist. No. 03AP-66, 2004-Ohio-4416, ¶ 70. “It is well settled that the issue of proximate cause is not subject to speculation and that conjecture as to whether a breach caused the particular damage is insufficient as a matter of law. ***If the plaintiff’s quantity or quality of evidence on proximate cause requires speculation and conjecture to determine the cause of the event, the defendant is entitled to summary judgment as a matter of law.***” (Citations omitted.) *Mills v. Best Western Springdale*, 10th Dist. No. 08AP-1022, 2009-Ohio-2901, ¶20. Accordingly, summary judgment is appropriate where reasonable minds could not differ as to the proximate cause.” See *Janice Gilmore, Executor, et al. v. ODOT*, Court of Claims Case No. 2012-02569, decision August 26, 2013, emphasis added.

The fact is that Plaintiff’s expert, Mr. McCarthy, did not, and could not, testify that Defendant OSFC was the cause for the damages he had calculated in his “Measured Mile” calculation. It is one thing to say that Plaintiff was somehow inefficient or non-productive in its work. It is quite another to opine (and neither Mr. McCarthy nor Mr. Martin could), that the numerous breaches allegedly committed by Defendant were the direct and proximate cause of the damages calculated in the Measured Mile.

The undisputed testimony from Mr. Martin was that it was up to Mr. McCarthy to make the link between the plan deficiencies and the damages. Motion at Ex. G. Mr.

McCarthy's undisputed testimony is that he did not do any "forensic rebuilding of the schedule," nor did he attribute any damages to the alleged deficiencies in the plans. Motion at Exhibit H. Plaintiff counters the absence of proximate cause by stating that the Motion merely cited to deposition questions where Mr. McCarthy was asked to connect actions or omissions of the architect or construction manager to the damages, and did not refer to OSFC. Brief in Opp. at 39. First, this is not accurate and in any event, is wholly irrelevant. The questions posed referred to the breaches being alleged by Plaintiff in this case, which Plaintiff's own complaint alleges were carried out by Defendant, through the AE or the CM. The failure of Plaintiff's expert to establish proximate cause has nothing to do with whether deposition questions were posed about the actions of the AE and CM, versus the OSFC. The lack of proximate cause stems from the fact that Mr. McCarthy specifically stated: "I have not done any kind of forensic rebuilding of the schedule." Deposition of Donald McCarthy at 59, Motion at Exhibit H. Without an as-built schedule, Mr. McCarthy simply cannot opine on any casual factors in the damages resulting from his Measured Mile analysis. That analysis does not address causation, it merely demonstrates the cost differential between an alleged un-impacted portion of scope as opposed to an impacted portion of scope. It does not make any analysis of causation, it only estimates the differential costs between two areas of work. For all we know, the causation for the difference in the two portions of scope centered on events within Plaintiff's control or events that had nothing to do with the Owner. For this reason Plaintiff cannot demonstrate that Defendant is responsible for the alleged damages of Plaintiff.

Pursuant to Evid. R. 901(7) and 902(4), Defendant OSFC, as a public body, may tender for admissibility public records or reports, or certified copies of public records, which, respectively, are either authenticated based on a showing that the record is from the public office, or is a self-authenticating document. Thereby, Defendant OSFC, a public office, may certify a public record for admissibility, whereas Plaintiff cannot.

Additionally, Plaintiff has cited to deposition testimony without filing the appropriate deposition, contrary to Civ. R. 32(A), which provides that “[e]very deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing.” This matter is set for non-oral hearing on May 28, 2014. As of the present the deposition of James Swartzmiller, Exhibit E attached to Plaintiff’s Brief in Opposition, has not been filed with the Court, and should not be considered for purposes of deciding the Motion.

CONCLUSION

For the above stated reasons, Plaintiff has not complied with the requirements of GC Article 8 and has therefore waived making its claims. Plaintiff has also failed to tender any evidence which would support that the actions of Defendant OSFC is the proximate cause for Plaintiff’s alleged losses. Finally, only the General Assembly can legislate an extension to the 2-year statute of limitations for actions in the Court of Claims.

Respectfully submitted,

MIKE DeWINE
Ohio Attorney General



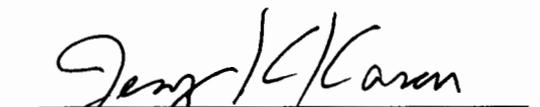
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was sent by regular U.S. mail,
postage prepaid, and email this 23d day of May 2014 to:

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